

Guidance Document
For
Requests Pursuant to N.J.A.C. 7:1B



New Jersey Department of Environmental Protection
July 2012

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Purpose:

This guidance provides information for prospective applicants requesting a waiver of strict compliance with a Department rule under N.J.A.C. 7:1B (Waiver Rule or Rule). This information applies to all waiver requests pursuant to N.J.A.C. 7:1B. Program-specific information and frequently asked questions (FAQs) are also available on the Department's Waiver Rule webpage at <http://www.state.nj.us/dep/waiverrule/>. The Waiver Rule contains standards for: waiver prohibitions; basis for a waiver; and evaluation criteria.

Instructions:

An applicant should first refer to the waiver prohibitions in N.J.A.C. 7:1B-2.1(b) for a list of rules the Department cannot waive under any circumstance. It is the applicant's responsibility to identify the specific rule sought to be waived and demonstrate that a waiver of that rule is not prohibited by N.J.A.C. 7:1B-2.1(b). The Waiver Rule website contains guidance to assist an applicant in determining if Department rules may be part of an authorized, delegated, or assumed federal program, which is prohibited in N.J.A.C. 7:1B-2.1(b)2. If a waiver of a rule is not prohibited, the applicant should then consult this document for further information on the basis and evaluation criteria.

It is the applicant's responsibility to provide information supporting a basis for a waiver, and showing that all applicable criteria and requirements of the Waiver Rule are met in order to qualify for a waiver. In requesting a waiver under N.J.A.C. 7:1B, the applicant should use best professional judgment in preparing submissions for a waiver request. The applicant should be familiar with the underlying program rules contained in the chapter within which the waiver request is being made and their general purpose and requirements. For instance, an applicant requesting a waiver of a rule in the New Jersey Pollutant Discharge Elimination System (NJPDES) chapter (N.J.A.C. 7:14A) should be familiar with the entirety of the NJPDES chapter.

The Waiver Rule applies in limited circumstances. As stated, in N.J.A.C. 7:1B-1.1(b), it is not the purpose of the Waiver Rule to allow for the routine circumvention of any Department rule. To help the Department evaluate and assess the merit of a waiver request, it is in the applicant's interest to provide as much information that supports the waiver request. The applicant should consult the administrative and technical submission requirements of the underlying program rules to assist in submitting waiver requests made under N.J.A.C. 7:1B.

The following sections provide additional information for the applicant's consideration in requesting a waiver of strict compliance of a Department rule. As the Department routinely publishes waiver request decisions, this information will inform prospective applicants, other stakeholders, and the public. Check <http://www.state.nj.us/dep/waiverrule/> for further information.

Basis for a Waiver:

The Department may waive the strict compliance with a Department rule when a basis for a waiver exists. N.J.A.C. 7:1B-2.1(a). The Waiver Rule limits waiver approvals by the Department to waiver requests demonstrating at least one of four bases, which are defined in N.J.A.C. 7:1B-1.2: Conflicting Rules; Unduly Burdensome, Net Environmental Benefit; and Public Emergency. Applicants should consider providing the following information for their specific basis for the waiver request. In addition, applicants should consider providing information described in the section below addressing the waiver evaluation criteria (N.J.A.C. 7:1B-2.2) that the Department will use to evaluate waiver requests.

Unduly Burdensome

The Unduly Burdensome definition contains two separate and distinct provisions that an applicant can request a waiver under. An applicant may provide information for one, or both, provisions as part of a waiver request.

For all Unduly Burdensome requests, if the underlying program rules for which a waiver is being sought contains a waiver, variance, or exemption provision, the applicant requesting a waiver on the Unduly Burdensome basis should explain the reasons for not availing itself of such existing provisions.

1. Actual, exceptional hardship for a particular project, or activity, or property

- A statement detailing how the circumstances give rise to an exceptional hardship and how a waiver request will alleviate this hardship. For example, the specific circumstances an applicant may identify include, but are not limited to:
 - Exceptional topographic, physical, or chemical conditions or features uniquely affecting a specific piece of property, or structures thereon; or
 - An extraordinary and exceptional situation uniquely affecting a specific piece of property, or structures existing thereon; or
 - Technical impracticability of treatment technologies for the particular project, activity, or property; or
 - Temporal or other non-physical characteristics unique to the particular project, activity, or property; or
 - Other unique circumstances associated with the particular project, activity, or property

2. *Excessive cost in relation to an alternative measure of compliance that achieves comparable or greater benefits to public health and safety or the environment*

- A statement of specific facts supporting an alternative measure:
 - An explanation of the benefit to public health and safety or the environment of strict compliance of the rules sought to be waived; and
 - A description of the alternative measure; and
 - An explanation of the benefit to public health and safety or the environment of the alternative measure of compliance; and;
 - A discussion comparing how the alternative measure of compliance provides comparable or greater benefit to public health and safety, or the environment than strict compliance with the rule sought to be waived
- A statement of specific facts detailing costs of compliance
 - Detail the expected cost of strict compliance with the rule sought to be waived; and
 - Detail the expected cost of the alternative measure of compliance with the rule sought to be waived, including any costs or benefits to potentially affected individuals or community; and
 - A discussion comparing the costs of strict compliance and the alternative measure of compliance

Net Environmental Benefit

The definition for the Net Environmental Benefit basis contains several criteria that must be met by an applicant's waiver request to qualify for a possible waiver:

A situation in which the quantitative or qualitative benefit to a natural resource or other related environmental good for which the Department has responsibility would substantially outweigh any detriment to that natural resource or environmental good, which would result from a waiver. There must be an adequate geographic and resource nexus between the environmental offset and the natural resource or other environmental good that is protected by the rule being waived. The net environmental benefit may include mitigation, but it must be beyond what the waived rule would have required independent of the waiver.

- A statement detailing the environmental benefit of the natural resource or related environmental good protected by the rule sought to be waived:
 - Identify the natural resource or related environmental good protected by the rule sought to be waived and the benefit achieved through strict compliance with that rule sought to be waived; and
 - Detail the proposed environmental offset
 - Identify the benefit and/or detriment of the environmental offset offered in the waiver request, accounting for any detrimental impact the waiver would have on the natural resource or related environmental good; and
 - Identify the geographic scope of the natural resource or related environmental good protected by strict compliance with the rule sought to be waived; and
 - Identify the geographic scope of the environmental offset offered in the waiver request; and
 - Compare the benefits to the natural resource or related environmental good of strict compliance with the rule sought to be waived with that of the offered environmental offset.
- The applicant should consider the natural resource type protected by the rule sought to be waived versus the benefit of the proposed environmental offset (resource nexus). Consistency between resource types should be achieved to greatest extent practicable. The less direct the connection between the proposed environmental offset and the natural resource or other environmental good protected by the rule being waived, the more tenuous the nexus is likely to be and the more difficult the demonstration of nexus may be for the applicant.
- The applicant should ensure the benefit of the environmental offset is localized to the greatest extent practicable (geographic nexus). The farther the proposed environmental offset is from the natural resource or other environmental good protected by the rule being waived, the more tenuous the nexus is likely to be and the more difficult the demonstration of nexus may be for the applicant.
- If an applicant is proposing mitigation as part of the waiver request, the applicant should describe how the proposed mitigation exceeds any mitigation required by underlying program rules

Conflicting Rules

The definition for the Conflicting Rules basis directs an applicant of a waiver request to identify how specified rules conflict with each other.

Means a situation in which two or more Department rules, or a Department rule and the rule of another State agency or a Federal agency, conflict so as to make compliance with both rules impossible or impracticable

- “Impossible” - cannot physically or temporally comply with both rules
- “Impracticable” – possible to comply with both rules but extremely or unreasonably difficult to do so
- A statement detailing the impossibility or impracticability
 - Identify the rules causing the conflict
 - Identify the purposes of each rule within the conflict
 - Identify the specific circumstances leading to the conflict
 - Specify the proposed means to alleviate the conflict, including the technical feasibility and ability to conform with all applicable rules’ terms and conditions
- Cost considerations should be addressed through a waiver request under an Unduly Burdensome basis

Public Emergency

The definition of the Public Emergency basis directs an applicant of a waiver request to provide information on how the emergency impacts the applicant’s ability to strictly comply with the rule sought to waived.

A situation in which a Federal or State official with the authority to do so declares a public emergency

- Issuing Authority declaring the authority:
 - Governor of New Jersey
 - President of the United States
 - Administrative agency with the power to declare a state of emergency
- Declaration of emergency
 - Executive order
 - Administrative order
- Scope of emergency
 - Waiver request should be limited to a remedy within the scope of the declared emergency

Waiver Evaluation Criteria (N.J.A.C. 7:1B-2.2):

Applicants should consider providing the following information as part of a waiver request since the Department will evaluate waiver requests based on the following criteria:

1. Sufficient public notice
 - Statement of the applicable public notice requirements
 - Applicants may refer to the Department’s Waiver Rule Public Notice reference guide (available at <http://www.state.nj.us/dep/waiverrule/>) to help identify if specific public notice rules may be in effect
 - Some underlying program rules require public notice prior to submitting an application for Department review and action. In such cases, the applicant must demonstrate that pre-application notice is satisfied
2. Sufficient information to support the waiver request
 - Submission documentation consistent with the underlying program rules, such as particular technical information, site plans, and resource data
 - Information specified in any technical guidance or Department manual for the underlying program rule
3. A statement detailing the specific circumstances for the need of a waiver under N.J.A.C. 7:1B
 - The applicant’s demonstration that a basis for a waiver may exist should provide information on the circumstances leading to the waiver request
 - If the underlying program rules contain a waiver, variance, or exemption provision, the applicant should consider the reasons for not availing itself of that provision of the underlying program rules
4. A statement specifying if the applicant directly caused or contributed to the circumstances resulting in the waiver request
5. If applicable, for a waiver requested on the basis of Net Environmental Benefit, an explanation of the impact of the waiver on the remediation and/or redevelopment of a contaminated site, or on the expansion of an existing development
 - For instance, a demonstration that a waiver would facilitate remediation of a contaminated site could potentially enhance the extent to which evaluation of this criterion supports approval of the waiver.
 - Refer to the “Net Environmental Benefit” basis information in this guidance
6. A statement explaining how the requested waiver is consistent with the Department’s core missions to “maintain, protect, and enhance New Jersey’s natural resources and to protect the public health, safety, and welfare, and the environment” (see N.J.A.C. 7:1B-1.1(a)) in light of the purposes and objectives of the particular enabling statute(s) and underlying program rules for the rule sought to be waived.
7. If applicable, a statement explaining how the requested waiver is a reasonable and effective response to a public emergency
 - Refer to the “Declared Public Emergency” information